Commonwealth of Massachusetts
State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 519

IN THE MATTER
OF
PETRUZZI & FORRESTER, INC.

Appearances: Karen Gray, Esq.
Counsel for the Petitioner

John Petruzzi and William Forrester
Pro se for the Respondent

Commissioners: Brown, Ch., Burnes, Gleason, Larkin and McDonough

Presiding Officer: Commissioner Herbert P. Gleason, Esq.

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on April 6, 1995 by issuing an Order to Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR 1.01(5)(a). The OTSC alleged that Petruzzi & Forrester, Inc., ("Petruzzi & Forrester") violated G.L. c. 268A, §3(a) by providing certain gratuities to Massachusetts Turnpike Authority ("MTA") employee James Flanagan ("Flanagan"). Specifically, the Petitioner alleged that Petruzzi & Forrester violated §3(a): by giving to Flanagan a "free car"; and/or by giving to Flanagan a seven month $2,000 interest-free loan; and/or by forgiving Flanagan's $2,000 debt (owed for the car); and/or by giving Flanagan a discount of $50 or more on the fair market value of the car.

Petruzzi & Forrester filed its answer on May 30, 1995, admitting that it had transferred a vehicle to Flanagan. Pre-hearing conferences were held in this matter and in re James Flanagan (Docket No. 518) on May 8, 1995, August 18, 1995, August 29, 1995, and October 12, 1995, with Commissioner Gleason presiding.[1/] At those conferences, procedural issues were discussed primarily focusing on discovery and scheduling, as well as the possibility of settlement.

An adjudicatory hearing was held in this matter and in re James Flanagan on October 30, 1995, and November 8, 1995. At the beginning of the hearing on October 30, 1995, the Petitioner sought to have the Commission recognize the Answers of the Respondents as part of the record of the adjudicatory proceeding.

At the conclusion of evidence, the parties were invited to submit legal briefs to the full Commission. 930 CMR 1.01(9)(k). The Petitioner submitted its brief on December 11, 1995. Petruzzi & Forrester did not file a brief.

The parties were also invited to present their closing arguments before the full Commission. 930 CMR 1.01(9)(e)(5). Closing arguments were heard on December 13, 1995. Petitioner presented its closing argument at that time as did William Sullivan, Esq., on behalf of Flanagan. Petruzzi & Forrester did not present a closing argument on December 13, 1995. Deliberations began in executive session on that date. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1).

Deliberations were concluded on January 17, 1996.

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties, including the hearing transcript.[2/]

II. Findings

A. Jurisdiction

It is undisputed that at times relevant to the allegations of the OTSC, Flanagan was a "state employee" within the meaning of G.L. c. 268A, §3(a).

B. Findings of Fact

1. Petruzzi & Forrester is a construction company doing business in Massachusetts. Petruzzi & Forrester has previously provided construction services to the MTA.

2. From 1979 until March 29, 1993, the MTA employed Flanagan as an Assistant Division Engineer. From March 29, 1993, until August of 1994, when his employment was terminated, Flanagan was employed by the MTA in the position of Construction Inspector.

3. MTA Assistant Division Engineers direct and participate in the monitoring of contractors and the inspection of construction projects to assure that plans and specifications are being properly implemented. Responsibilities for the position include the preparation of records involving the recording of total quantities, payments and work performed.[3/]

4. MTA Construction Inspectors monitor the activities of construction contractors to assure that plans and specifications are adhered to. Responsibilities for the position include measuring quantities of materials and maintaining a daily record of activities.[4/]

5. MTA Assistant Division Engineers and Construction Inspectors, in carrying out their responsibilities, exercise discretion and make decisions which affect the financial interests of the MTA contractors whom they are overseeing.[5/]

6. Prior to 1992, Petruzzi & Forrester was awarded two MTA construction contracts. Petruzzi & Forrester also served as a sub-contractor with regard to an MTA paving contract.

7. Flanagan served as the Assistant Division Engineer with regard to a construction project at Turnpike Interchange 11A, which was completed during the early summer of 1990. Subsequently, Flanagan served as the Assistant Division Engineer with regard to a construction project at the Turnpike Interchange 9 toll plaza during the summer and fall of 1990. During 1990, Flanagan also served as the Assistant Division Engineer with regard to a paving project at Turnpike Interchange 9. With regard to each of the foregoing projects, Flanagan admitted that he supervised the work of Petruzzi & Forrester.

8. On December 12, 1992, the MTA awarded Petruzzi & Forrester a rock excavation contract (#851-426) valued at approximately one million dollars.

9. With regard to MTA contract #851-426, during the period of December 12, 1992, through March of 1993, Flanagan held the title of Assistant Division Engineer but performed the functions of an "office engineer".

10. Flanagan's functions with regard to MTA contract #851-426 included assembling shop drawings, using quality control ledger numbers to prepare pay estimates and investigating extra work orders.

11. A document entitled "Preconstruction Conference" which was prepared in the normal course of an MTA construction project, indicated that Flanagan's role in relation to MTA contract #851-426 would be limited to assembling and reviewing shop drawings. However, in preparing pay estimates for the contract, Flanagan was in a position to question and verify measurements which were supplied to him by the project inspector, Kevin Moriarty.[6/]

12. With regard to MTA contract #851-426, Flanagan participated in the review of an extra work order, resulting

in a payment to Petruzzi & Forrester of an additional $16,000, and in the resolution of a controversy concerning the bid specifications.[7/]

13. In late March of 1993, Flanagan approached Petruzzi and informed him that he was interested in purchasing a car owned by Petruzzi & Forrester. The car, a 1989 Oldsmobile Cutlass Ciera with 119,000 miles, had been previously used by a Petruzzi & Forrester employee who no longer worked for the company.

14. Prior to April 6, 1993, Petruzzi & Forrester contacted Brookfield Motors and received an oral (by telephone) estimate as to the value of the car.[8/] Brookfield Motors did not inspect the car in connection with its oral estimate of the car's value.

15. Although the car was not on the market, Petruzzi & Forrester agreed to sell it to Flanagan for $2,000 after receiving the oral estimate from Brookfield Motors.

16. On April 6, 1993, Flanagan and Petruzzi & Forrester signed a bill of sale which stated that Flanagan had paid and delivered $2,000 to Petruzzi & Forester for the car.

17. On April 22, 1993, Flanagan registered the car in his name. On or about May 7, 1993, Flanagan dropped off to Petruzzi & Forrester the license plates that were left on the car when Flanagan took possession of it. The Massachusetts Registry of Motor Vehicles acknowledged receipt of the Petruzzi & Forrester license plates on May 11, 1993.[9/]

18. Flanagan paid $215 in sales tax to the Massachusetts Registry of Motor Vehicles as a result of his purchase of the vehicle.

19. Between April 6, 1993, and November 5, 1993, Flanagan did not make payment of the agreed upon $2,000 purchase price. During the same period, Petruzzi & Forrester did not pursue payment for the car.

20. Petruzzi & Forrester understood that Flanagan could not and, therefore, would not pay for the vehicle on April 6, 1993. In addition, Forrester understood that Flanagan would pay for the vehicle some time after April 6, 1993, but he did not know when.[10/]

21. Forrester understood that Flanagan had an obligation to pay $2,000 for the car and he always intended for Flanagan to pay that debt.[11/]

22. Subsequent to April 6, 1993, Forrester put a folder containing information on the sale of the car in his "suspense file".[12/] Because the time period following the transfer of the vehicle was Petruzzi & Forrester's "busy season", however, Forrester never looked in that file between April and November of 1993. Moreover, Forrester failed to follow up on the outstanding $2,000 debt owed by Flanagan because of the fact that he alone ran the office for Petruzzi & Forrester without any support staff.[13/]

23. At all times prior to November 5, 1993, Flanagan intended to pay Petruzzi & Forrester $2,000 for the vehicle.[14/]

24. On November 2, 1993, Massachusetts State Police Officer Walter Carlson went to the offices of Petruzzi & Forrester to inquire about Petruzzi & Forrester's sale of the car to Flanagan. Immediately thereafter Petruzzi & Forrester telephoned Flanagan to inform him of the State Police investigation.

25. On November 5, 1993, Flanagan paid Petruzzi & Forrester $2,000 for the car.

26. Between April 26, 1993 and October 5, 1994, Flanagan paid a total of $3,322.90 for repairs to the vehicle involving the battery, tires, starter, steering, hoses, transmission, ignition and brakes.[15/]

27. Flanagan's relationship with Petruzzi & Forrester was based solely on his official interaction with them as an MTA employee.[16/]

III. Decision

The Petitioner contends that Petruzzi & Forrester violated G.L. c. 268A, §3(a). This section prohibits anyone, otherwise than as provided for by law for the proper discharge of official duty, from directly or indirectly, giving, offering or promising anything of substantial value to any present or former public employee for or because of any official act[17/] performed or to be performed by such an employee.

We must therefore determine whether Petruzzi & Forrester gave Flanagan an item of substantial value, and if so, whether the gift was for or because of any official act performed or to be performed by Flanagan.

The term "substantial value" is not defined in G.L. c. 268A. In construing this term, both the courts and the Commission have established a $50 threshold at which and above, a gift will be regarded as of substantial value. See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1986) (a gift of $50 would be considered substantial within the context of §3(b)); *Commission Advisory No. 8 (Free Passes) (1985); EC-COI-93-14* (re-affirming Commission's use of $50 threshold in measuring substantial value). The Commission has not limited its application of §3 and the $50 threshold to cash gifts. Rather the Commission has found tickets, meals, loans (*In re Antonelli*, 1982 SEC 101) and transportation valued at $50 or more to be of substantial value. In contrast, gifts, discounts or meals worth less than $50 have been treated as of nominal value. See *In re Michael,* 1981 SEC 59.

Here, the Petitioner alleges that by not requiring Flanagan to pay $2,000 for the car after he had taken possession of it, Petruzzi & Forrester gave Flanagan something of substantial value because it:

a) gave Flanagan a "free car"; or

b) had forgiven the $2,000 debt; or

c) had given an interest free loan of $2,000 for seven months; or

d) had given a discount of $50 or more on the fair market value of the car.

a. ***Gift of a Car***

The parties agree that Petruzzi & Forrester provided to Flanagan a 1989 Oldsmobile Cutlass Ciera with 119,000 miles on April 6, 1993. It is undisputed that Flanagan paid to Petruzzi & Forrester $2,000, the agreed upon sales price, on November 5, 1993. Thus, the Commission does not find that Petruzzi & Forrester provided to Flanagan a "free car".

b. ***Forgiveness of Debt***

The Petitioner contends that Petruzzi & Forrester gave to Flanagan something of substantial value because the debt owed for the vehicle had been forgiven prior to the State Police investigation. In other words, the Petitioner would have us find that had the State Police not investigated the transaction, Petruzzi & Forrester would not have required Flanagan to pay the $2,000 debt.

On this point, the Commission finds that the Petitioner has presented no direct evidence to demonstrate that Petruzzi & Forrester had at any time forgiven the $2,000 debt. Based on the most obvious evidence, the fact that Petruzzi & Forrester eventually notified Flanagan of the outstanding obligation (albeit after the State Police investigation) and the fact that Flanagan eventually paid the previously agreed upon purchase price of $2,000, we conclude that Petruzzi & Forrester did not forgive the debt. Moreover, even if we consider the Petitioner's theory that, but for the State Police investigation, Petruzzi & Forrester had already treated and would continue to treat Flanagan's debt as forgiven, we do not find that the theory is supported by any direct evidence. Flanagan testified that, at all times after receiving the car, he intended to pay the $2,000. Mr. Forrester also testified that there was no doubt in his mind that Flanagan was under an obligation to pay the $2,000 agreed upon price. Thus, the only two parties who could give definitive testimony with regard to the terms of the transaction provided testimony in contradiction to the Petitioner's allegation that the debt had been forgiven.

Further, we find that the circumstantial evidence put forth by the Petitioner does not permit us to draw a reasonable inference that Petruzzi & Forrester had forgiven the $2,000 debt. In particular, the Petitioner has proven by undisputed evidence the passage of a seven-month time period following the receipt of the car and before the payment of $2,000

was made. Moreover, the Petitioner established that the aforementioned payment occurred only after a state police investigation concerning the car's transfer had commenced.

In response, however, Petruzzi & Forrester argue that they understood that Flanagan would not and could not pay for the vehicle on April 6, 1993. Forrester testified that it was his understanding that Flanagan would be paying for the car some time later. We have credited Forrester's testimony that he put a folder containing information on the sale of the car in his "suspense file", but that because of time of year (their busy season), he never looked in that file between April and November of 1993. Moreover, Forrester explained that his failure to follow up on Flanagan's payment resulted from the small size of their office.

In summary, the Petitioner's allegation that the debt was forgiven by Petruzzi & Forrester is supported, at best, by circumstantial evidence. However, we find Forrester's explanation concerning his failure to collect the debt during the seven month period credible. This explanation rebuts the Petitioner's circumstantial evidence. We, therefore, conclude that the Petitioner has not proven by a preponderance of the evidence that the debt was forgiven.

c. ***Interest Free Loan***

The Petitioner alleged that, even if Petruzzi & Forrester intended eventually to require Flanagan to pay for the car, Petruzzi & Forrester provided an interest free loan of $2,000 for seven months. However, we find that Petitioner failed to meet its evidentiary burden concerning the value of the alleged loan, the type of loan provided, the prevailing interest rate for an automobile loan at the relevant time, etc. Because we cannot make such determinations without evidence before us, we cannot reasonably conclude that Petruzzi & Forrester provided something of substantial value in the nature of an interest free loan.

d. ***Discount***

The Petitioner further alleged that Petruzzi & Forrester provided Flanagan with a discount of $50 or more on the fair market value of the vehicle. We find that the record is devoid of clear and reliable direct evidence demonstrating that the fair market value of the vehicle was $2,050 or greater.[18/]

The Petitioner relies on circumstantial evidence as to the vehicle's fair market value. In particular, the Petitioner put forth the amount of sales tax ($215) paid by Flanagan to the Registry of Motor Vehicles on his purchase of the vehicle. Petitioner argues that the Commission may draw an inference from this evidence that, assuming a sales tax rate of 5%, the Registry believed the value of the car to be $4,300. However, the Petitioner presented no testimony or documentary evidence as to how the Registry assesses the value of a vehicle for sales tax purposes. Forrester testified that, based on his own inquiry of the Registry, that agency uses a computer generated value which does not take into account the condition or mileage of the vehicle. The owner of the vehicle may file for an abatement if, due to the condition of the car, the actual value is believed to be less than that which is assigned to the vehicle by the Registry.[19/] Because there was no evidence as to how the Registry's values are arrived at, we cannot reasonably draw an inference as to the fair market value of the vehicle based on the Registry's collection of $215 in sales tax.

In response to the Petitioner's allegation, the Respondent contends that the $2,000 price paid for the car reasonably reflected the fair market value of the vehicle. In support thereof the Respondent submitted the NADA Official Used Car Guide for May, 1993, to demonstrate that a high mileage deduction of $2,500 would be applicable to a 1989 intermediate or personal luxury car with 115,000 to 130,000 miles.[20/] There was not, however, any testimony or other evidence to demonstrate how this guide could be used to assess the actual or fair market value of the car in question.[21/] Additionally, Flanagan submitted repair bills for the vehicle which he incurred between 4/26/93 and 10/5/94 totalling $3,322.90. Finally, Petruzzi & Forrester presented evidence that the depreciated "value of the car", as shown on Petruzzi & Forrester's 1993 tax return, was $1,818. As a result, the company reported a taxable gain of $182 on the sale. There was no testimony as to how the amount of depreciation was calculated although the tax return was prepared by a Certified Public Accountant.

We therefore find that the Petitioner has not put forth sufficient direct evidence of the fair market value of the vehicle. Moreover, we do not find the circumstantial evidence sufficiently clear or reliable so as to permit us to draw an inference as to the vehicle's fair market value.[22/] As a result, we conclude that the Petitioner has not proven by a preponderance of the evidence that Flanagan received a discount of $50 or more on the fair market value of the vehicle.

Because we conclude that the substantial value element of §3(a) has not been proven with regard to any of the Petitioner's allegations, we do not reach the question: was Flanagan, immediately prior to the transfer of the vehicle, in a position to use his authority to affect Petruzzi & Forrester so that a gift to him would violate §3(a).

The Commission has previously found a §3 violation where gifts and other things of substantial value are given "for or because of" the employee's official acts even where there is no understood "quid pro quo" or intent to influence the employee's acts. The Commission will examine the relationship between the gratuity and the employee's official duties. The Commission has previously explained that

> [a] public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of Section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple enumeration for doing what employees are already obliged to do - a good job. Sound public policy necessitates a flat prohibition since the alternative would present unworkable burdens of proof. It would be nearly impossible to prove the loss of an employee's objectivity or to assign a motivation to his exercise of discretion. *In re Michael*, 1981 SEC 59, 68.

In its *Free Passes* Advisory, the Commission announced that the application of §3 is not limited to instances in which matters are actually pending before a public official, but includes prior or future official acts as well. The Commission created a policy whereby it will infer a "for or because of" relationship between the gift and the recipient where there is no prior social or business relationship between the giver and the receiver, and where the recipient is in a position to use his authority in a manner which could affect the giver.

We note that in this case, we have found that Flanagan took actions in his official capacity which affected the interests of Petruzzi & Forrester. Furthermore, Dionne testified that there was a likelihood that Flanagan could have again been assigned to a Petruzzi & Forrester contract after the transfer of the vehicle.

IV. Conclusion

In conclusion, the Petitioner has not proven by a preponderance of the evidence that Petruzzi & Forrester gave to Flanagan something of substantial value in relation to the vehicle transaction. We therefore find that Petruzzi & Forrester did not violate §3(a) of G.L. c. 268A. Accordingly, this matter is now concluded.

DATE: January 17, 1996

[1/] Commissioner Gleason was duly designated as the presiding officer in this proceeding. See G.L. c. 268B, §4(e).

[2/] Commissioner Gleason is not a signatory to the Decision because his term ended prior to its issuance. He did, however, fully participate in the Commission's deliberations and decision in this matter.

[3/] This finding is derived from a written job description for the position of MTA Assistant Division Engineer which was admitted in evidence.

[4/] This finding is derived from a written job description for the position of MTA Construction Inspector which was admitted in evidence. MTA inspector Kevin Moriarty's testimony concerning his job responsibilities further supports this finding. Flanagan's testimony concerning his role as a Construction Inspector also supports this finding.

[5/] This finding is supported by the testimony of Ronald Dionne, MTA Division Engineer. Although on cross-examination, Mr. Dionne was challenged as to the extent of Flanagan's responsibility with regard a particular contract involving Petruzzi & Forrester, we find Dionne credible as to the general job responsibilities for the two MTA positions. Moreover, this finding is supported by written job descriptions for the two positions which were admitted in evidence.

[6/] This finding is supported by the testimony of Ronald Dionne. Although Dionne admitted on cross-examination that Flanagan did not give the final approval with regard to pay estimates or extra work orders, we find Dionne credible with regard to the actual role played by Flanagan on contract #851-426. We note that Flanagan admitted preparing the pay estimates.

[7/] This finding is supported by Ronald Dionne's testimony which we find credible.

[8/] Forrester's testimony as to the value placed on the car by Brookfield Motors was unclear.

[9/] This finding is based on Flanagan's testimony and several Registry of Motor Vehicles documents including a Plate Return Receipt.

[10/] This finding is supported by the testimony of Forrester. We note that Forrester was challenged on cross-examination concerning his prior understanding of when Flanagan would pay for the car. However, we find Forrester credible in that he understood payment would be made some time after April 6, 1993, and that the exact time for payment was not scheduled.

[11/] This finding is based on Forrester's testimony which we find credible.

[12/] The "suspense file" apparently was mechanism intended to work as a tickler system to remind Forrester of matters which would require his future attention.

[13/] We find Forrester's testimony concerning his failure to pursue payment from Flanagan due to other more pressing concerns credible.

[14/] This finding is based on Flanagan's testimony which we find credible. The Petitioner's introduction of evidence concerning Flanagan's financial status in 1993 does not prompt us to draw an inference contrary to this finding.

[15/] This finding is supported by the bills for these repairs which were admitted in evidence.

[16/] Flanagan testified that his relationship with Petruzzi & Forrester was purely business.

[17/] "Official act," any decision or action in a particular matter or in the enactment of legislation. G.L. c. 268A, §1(h).

[18/] As to the fair market value of the vehicle, Forrester testified that he received an oral estimate from Brookfield Motors (prior to April 6, 1993), which was based in part on a deduction for high mileage "somewhere in the neighborhood of $2,500." On cross examination, Forrester, claiming a lack of clear memory, put the Brookfield Motors statement of the high mileage deduction at "$2,900 or whatever. . . ." The testimony was unclear as to what value was actually placed on the car by Brookfield Motors. A written estimate from Brookfield Motors was admitted in evidence. The written estimate, prepared by Sales Representative Troy D. Kruzewski, was provided to Forrester in May of 1994 (more than one year after the transaction) and states that the "average loan" using "April's NADA official used card guide" is $2,075 which includes a mileage deduction of $2,200. However, we do not credit the written estimate as reliable where there was no evidence, other than the document itself, as to how it was prepared or what the meaning of the term "average loan" is and how it relates to the fair market value of a used vehicle.

[19/] There was no evidence as to whether Flanagan ever attempted to obtain an abatement and if he did not, the reason for that decision.

[20/] A review of the record indicates that the document was admitted solely for the purpose of demonstrating a mileage deduction as opposed to the value of the vehicle in question.

[21/] Because the car was not sufficiently identified, we are unable to determine which of several values provided by the Guide would be applicable to the car in question.

[22/] For example, there was no expert testimony as to the fair market value of a 1989 Oldsmobile Cutlass Ciera with 119,000 miles.